Not for Publication

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:	CASE NO.	01-34624 (LMW)
ICE CREAM LIQUIDATION, INC. f/ka FIELDBROOK FARMS, INC.,	CHAPTER	11
DEBTOR.		
ICE CREAM LIQUIDATION, INC. f/k/a FIELDBROOK FARMS, INC.,	ADV. PRO. NO.	03-3175 (LMW)
	DOC. I.D. NO.	1
PLAINTIFF		
vs.		
FABRICON PRODUCTS, INC.,		
DEFENDANT.		

APPEARANCES

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MEMORANDUM OF DECISION

Lorraine Murphy Weil, United States Bankruptcy Judge

The matter before the court is the above-captioned plaintiff's (the "Debtor") Adversary Complaint (A.P. Doc. I.D. No. 1, the "Complaint")[1] which seeks avoidance under 11 U.S.C. § 547(b) of certain allegedly "preferential" transfer payments (individually, a "Payment," and collectively, the "Payments") made to Fabricon Products, Inc. ("Fabricon"). In response, Fabricon asserts, *inter alia*, an affirmative defense of "ordinary course of business" pursuant to 11 U.S.C. § 547(c)(2). This court has jurisdiction over this proceeding under 28 U.S.C. § 1334(b) as a "core proceeding" within the purview of 28 U.S.C. § 157(b). This memorandum constitutes the findings of fact and conclusions of law mandated by Rule 7052 of the Federal Rules of Bankruptcy Procedure.

I. PROCEDURAL BACKGROUND

A. The Bankruptcy Case

The underlying chapter 11 case was commenced by a petition filed by the Debtor[2] on September 21, 2001 (the "Petition Date"). Pursuant to 11 U.S.C. §§ 1107 and 1108, the Debtor

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[1] References herein to the docket of this chapter 11 bankruptcy case are in the following form: "Case Doc. I.D. No. ___." References herein to the docket of the above-captioned adversary proceeding are in the following form: "A.P. Doc. I.D. No. ___.")

[2] The bankruptcy case was commenced by the Debtor then known as "Fieldbrook Farms, Inc." ("Fieldbrook"). By order (Case Doc. I.D. No. 210) dated December 20, 2001, Fieldbrook sold all or substantially all of its assets (as described in the order) to Fieldbrook Acquisition, Inc. One of the assets sold was the Debtor's name. By notice (Case Doc. I.D. No. 234), counsel for the Debtor notified the court of the name change of Fieldbrook to Ice Cream Liquidation, Inc. By order (Case Doc. I.D. No. 250) dated February 21, 2002, the court granted the Debtor's request to amend the caption in the chapter 11 case to reflect the Debtor's new name, Ice Cream Liquidation, Inc.

continued to operate its business as a debtor in possession. By order (Case Doc. I.D. No. 395) dated August 13, 2002, the court confirmed the Modified First Amended Joint Liquidating Plan of Reorganization (Case Doc. I.D. No. 394, the "Plan").[3] Among other things, the Plan reserved to the Debtor the authority to "prosecute any claims under Sections . . . 547 . . . and 550 of the [Bankruptcy] Code." (Plan ¶ 5.2(c).)

B. The Adversary Proceeding

Pursuant to paragraph 5.2(c) of the Plan, on September 17, 2003, the Debtor commenced this adversary proceeding by the filing of the Complaint. On December 2, 2003, Fabricon filed its [Amended] Answer (A.P. Doc. I.D. No. 8, the "Answer"). In the Answer, Fabricon denied that the Payments were "preferences" within the meaning of Bankruptcy Code § 547(b)[4]; and asserted, *inter alia*, the affirmative defense that the Payments were made in the ordinary course of business (the "Ordinary Course Defense") under Bankruptcy Code § 547(c)(2).

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[3] The Effective Date of the Plan was September 12, 2002. (*See* Case Doc. I.D. No. 422.)

[4] By failing to brief or argue that issue Fabricon is deemed to have abandoned that argument. In the Answer, Fabricon also asserted that the Payments were intended by the Debtor and Fabricon to be a "contemporaneous exchange for new value" within the meaning of Bankruptcy Code § 547(c)(1). Because that defense was not addressed at the Trial (as that term is defined below) or otherwise, the court deems that defense to have been abandoned. Fabricon did not claim the "new value" defense provided for under Bankruptcy Code § 547(c)(4). However, the Debtor purported to give Fabricon credit for "new value" in calculating the amount of the alleged preference. (*See* Plaintiff's Exhibit A (as defined and described below).) After such "new value" adjustment, the Debtor alleges preferential payments in the aggregate amount of $226,178.98.

The trial (the "Trial) of the adversary proceeding was held on August 16, 2004.[5] Roy Filkoff testified for the Debtor and Bruce Dinda testified for Fabricon.[6] Carl D. Herbein was called as an expert witness for both the Debtor and Fabricon.[7] Both the Debtor and Fabricon introduced documents into evidence at the Trial.[8] Two of Fabricon's proffered exhibits (marked for identification as Defendant's Exhibit's 5 and 6) were excluded from the record pursuant to the Evidence Order. (*See* A.P. Doc. I.D. No. 37.) At the close of the Trial, the court took the matter under advisement and instructed the parties to file post-Trial briefs (and optional answer briefs). Briefs have been filed herein and the matter now is ripe for decision.

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[5] A transcript (the "Transcript") of the Trial appears in the record as A.P. Doc. I.D. No. 42.

[6] Roy Filkoff is a financial consultant and principal of Altman and Company, the management consultant retained by the Debtor in this chapter 11 case (*see* Case Doc. I.D. No. 81). Prior to his association with the Altman firm, Mr. Filkoff was the chief financial officer of Fieldbrook for two years. Mr. Dinda is the president and majority owner of Fabricon. He first went to work for Fabricon in 1973 as a cost clerk in the accounting department. After about three years he became the cost manager running the department. Thereafter he also functioned as assistant controller for the company. (*See* Transcript at 170-71 (testimony of Mr. Dinda).) By order entered on August 17, 2004, Mr. Dinda was precluded from testifying as an expert witness but was permitted to testify as a fact witness. (*See* A.P. Doc. I.D. No. 37, the "Evidence Order.")

[7] Mr. Herbein was called as a hostile witness by Fabricon and as a rebuttal witness by the Debtor. Mr. Herbein is a certified public accountant and financial expert specializing in consulting to the dairy foods industry. (*See* Transcript at 82-83 (testimony of Mr. Herbein).) Both the Debtor and Fabricon accept Mr. Herbein as an expert witness.

[8] Citations to the Debtor's Trial exhibits appear in the following form: "Plaintiff's Exhibit __." Citations to Fabricon's Trial exhibits appear in the following form: "Defendant's Exhibit __." Plaintiff's Exhibit A is a spreadsheet prepared by Mr. Filkoff which tracks transactions (including invoice numbers, invoice/delivery dates, check amounts and payment dates) between Fabricon and the Debtor for the period (the "Preference Period") from June 23, 2001 to the Petition Date.

II. FACTUAL BACKGROUND

Based upon the entire record in this proceeding and in the chapter 11 case, the court finds the facts set forth below and elsewhere in this memorandum. At all relevant times, the Debtor was engaged in the business of manufacturing and distributing ice cream products and ice cream novelties. At all relevant times, Fabricon was in the business of providing packaging to the ice cream manufacturing industry. Fabricon had supplied the Debtor with ice cream novelty packaging since around 1996. (Transcript at 194 (testimony of Mr. Dinda).) The Debtor was a "valued customer" of Fabricon. (Transcript at 194-95 (testimony of Mr. Dinda).) The stated payment terms applicable to the Debtor's purchases from Fabricon were that payment on any purchase was due within thirty days of invoicing, but the Debtor would receive a one-percent discount if the relevant debt were paid within ten days. (Transcript at 147-48 (testimony of Mr. Herbein).) During its entire relationship with Fabricon, the Debtor never took advantage of the discount and never paid within the stated thirty-day term. (Transcript at 66 (testimony of Mr. Filkoff).)

During the eighteen months from January 1, 2000 to June 22, 2001 (the "Pre-Preference Period"), the average days outstanding (i.e., unpaid) ("ADO") for a Fabricon invoice to the Debtor was fifty-six (56) days. (Transcript at 99 (testimony of Mr. Herbein).) Fabricon permitted such "stretch" payment terms and dunned the Debtor only when the invoice remained unpaid for "around 60 days." (Transcript at 196, lines 15-16 (testimony of Mr. Dinda).) During the Preference Period, the ADO for a Fabricon invoice to the Debtor was approximately fifty-one (51) days. (*See* Defendant's Exhibit 2 (report of Mr. Herbein).)[9] During the Preference Period, the earliest date on

[9] For the purposes of this memorandum, a Payment is deemed made when the Debtor's check was paid by the payor bank.

which payment was made was the forty-seventh day and the latest date was the sixty-fourth day. (*See* A.P. Doc. I.D. No. 46 (Debtor's Reply Brief) at 11.)[10] Fabricon did not dun the Debtor at all during the Preference Period or engage in any abnormal collection practices during that period. (Transcript at 196-97 (testimony of Mr. Dinda).) Fabricon never charged the Debtor with late charges. (Transcript at 197 (testimony of Mr. Dinda).) Fabricon continued to ship product to the Debtor on credit during the Preference Period. (*See* Plaintiff's Exhibit A ("new value" calculation); Transcript at 197 (testimony of Mr. Dinda).) Other circumstances surrounding the Payments do not appear to have been unusual in any way in the context of the relationship between these parties. (*See* Transcript at 58-59, 72-75 (testimony of Mr. Filkoff); Transcript at 196-97, 208 (testimony of Mr. Dinda).)

It is "very common" for packaging suppliers to ice cream manufacturers to give as a standard payment term a one percent discount if payment is made within ten days. (Transcript at 113, 115 (testimony of Mr. Herbein).) Companies larger than the Debtor take advantage of that discount. (*See* Transcript at 114-116 (testimony of Mr. Herbein).) However, in the ice cream manufacturing industry, the ADO is forty-five (45) days. (*See* Defendant's Exhibit 2 (report of Mr. Herbein).)[11]

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[10] Fabricon does not dispute the range of payments.

[11] Fabricon initially contested the accuracy of the numbers stated above both as to the ADO's applicable to the parties here and to the industry. Subsequently, Fabricon adopted the Debtor's numbers for purposes of argument. (*See* A.P. Doc. I.D. No. 45 (Defendant Fabricon Product, Inc.'s Post-Trial Reply Brief).) The court adopts the Debtor's numbers also. Fabricon also initially contested the relevant industry for Section 547(c)(2)(C) purposes. Subsequently, Fabricon adopted the Debtor's statement of the relevant industry for purposes of argument. (*See* A.P. Doc. I.D. No. 45.) Because using the ice cream manufacturing industry as the relevant industry is reasonable, the court will follow the parties' lead in that respect also.

III. ANALYSIS

A. Preferential Transfer under Bankruptcy Code § 547(b)[12]

As noted above, Fabricon does not argue that the Payments do not satisfy Bankruptcy Code § 547(b). Rather, Fabricon argues that the Payments are not avoidable preferences under Bankruptcy Code § 547(c)(2). Consequently, the only issue before the court is whether the Payments are within the Ordinary Course Defense under Bankruptcy Code § 547(c)(2).

B. Ordinary Course Defense under Bankruptcy Code § 547(c)

Section 547 provides in pertinent part as follows:

. . .

(c) The trustee may not avoid under this section a transfer—

. . .

(2) to the extent that such transfer was—

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[12] Section 547 provides in pertinent part as follows:

. . .

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property —

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; . . . and

(5) that enables such creditor to receive more than such creditor would receive if —

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

. . .

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section . . . .

11 U.S.C.A. § 547 (West 2005).

> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> (B) made in the ordinary course or financial affairs of the debtor and the transferee; and
>
> (C) made according to ordinary business terms . . . .
>
> (g) For the purposes of this section, . . . the creditor . . . against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

11 U.S.C.A. § 547 (West 2005). Fabricon bears the burden of proving each of the three foregoing elements by a preponderance of the evidence. *Lawson v. Ford Motor Co. (In re Roblin Industries, Inc.)*, 78 F.3d. 30, 39 (2d Cir. 1996). There is no dispute that the debt for which the Payments were made was incurred by the Debtor in the ordinary course of business pursuant to Bankruptcy Code § 547(c)(2)(A). Accordingly, the only issues before the court are those presented under Bankruptcy Code § 547(c)(2)(B) and Bankruptcy Code § 547(c)(2)(C).

1. Bankruptcy Code § 547(c)(2)(B)

Bankruptcy Code § 547(c)(2)(B) "requires a subjective examination of whether a transfer was ordinary between the parties to the transfer, meaning whether the payments were consistent with the course of dealings between the particular parties." *McCarthy v. Navistar Financial Corp. (In re Vogel Van & Storage, Inc.)*, 210 B.R. 27, 34 (N.D.N.Y. 1997), *aff'd*, 142 F.3d 571 (2d Cir. 1998) (citations and internal quotation marks omitted).

> There is no precise legal test that can be applied in determining whether payments by the debtor during the . . . [Preference Period] were made in the ordinary course of business; "rather, the court must engage in a 'peculiarly factual' analysis."

5 Alan N. Resnick and Henry J. Sommer, *Collier on Bankruptcy* ¶ 547.04[2][a][ii][B], at 547-58 (15th ed. rev. 2004) (footnote omitted). "The determination is based on the surrounding facts, and include such factors as 'the history of the parties' dealings with each other, timing, amount at issue,

and the circumstances of the transaction." *Swallen's, Inc. v. Corken Steel Products Co. (In re Swallen's, Inc.)*, 266 B.R. 807, 813 (Bankr. S.D. Ohio 2000) (citation omitted).

These parties had a long and apparently cordial relationship. There was no dunning or collection activity by Fabricon during the Preference Period. Fabricon did not charge the Debtor any late fees then or ever. Fabricon continued to ship product to the Debtor on credit during the Preference Period. The ADO for the Pre-Preference Period exceeded the ADO for the Preference Period by only five (5) days. The range of invoice days outstanding during the Preference Period was only from forty-seven (47) days to sixty-four (64) days. There is no other evidence that the Payments deviated from the ordinary course for these parties. Based upon all of the foregoing, the court is persuaded that the Payments were in accordance with the ordinary course of business between these parties. The court finds the Debtor's arguments to the contrary unpersuasive.

2. Bankruptcy Code § 547(c)(2)(C)

The United States Court of Appeals for the Second Circuit has held that the term "ordinary business terms" in Bankruptcy Code § 547(c)(2)(C) "requires a creditor to demonstrate that the terms of a payment for which it seeks the protection of the ordinary course of business exception fall within the bounds of ordinary practice of others similarly situated." *Roblin Industries*, 78 F.3d at 41. The *Roblin Industries* court further instructed:

> Under this standard, a creditor must show that the business terms of the transaction in question were "within the outer limits of normal industry practices," *id.*, in order to satisfy the third element of § 547(c)(2). The conduct of the debtor and creditor are considered objectively in light of the industry practice . . . . Defining the relevant industry is appropriately left to the bankruptcy courts to determine as a question of fact heavily dependent upon the circumstances of each individual case . . . . The burden of proof to show industry practice, however, is on the creditor who seeks to retain a payment at the expense of the other creditors.

Roblin Industries, 78 F.3d at 40-44. The court must be able to determine "that there exists some basis in the practices of the industry to authenticate the credit arrangement at issue. Otherwise, the practice cannot be considered an ordinary way of dealing with debtors." *Gulf City Seafoods, Inc. v. Ludwig Shrimp Co., Inc. (In re Gulf City Seafoods, Inc.)*, 296 F.3d 363, 369 (5th Cir. 2002).

The term "ordinary business terms" within the relevant industry is not limited to a "single, uniform set of business terms" but "refers to the *range* of terms that encompasses the practices . . . [and] only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection C." *In re Tolona Pizza Products Corp.*, 3 F.3d 1029, 1033 (7th Cir. 1993) (emphasis in original). *See also Gulf City Seafoods*, 296 F.3d at 369 (ultimate inquiry is whether credit arrangement "is so out of line with what others [in the relevant industry] do"); *Roblin Industries*, 78 F.3d. at 40 (creditor must show that business terms are "within the outer limits of normal industry practices") (citation and internal quotation marked omitted); *Fiber Lite Corp. v. Molded Acoustical Products, Inc. (In re Molded Acoustical Products, Inc.)*, 18 F.3d 217, 226 (3d Cir. 1994) ("[D]epartures from the relevant industry's norms which are not so flagrant as to be 'unusual' remain within subsection C's protection.").

As noted above, the ADO for the relevant industry is forty-five days. The court finds that payments made on a forty-five day schedule would be normal and ordinary for vendees similar to the Debtor in that industry. As noted above, the ADO for these parties during the Preference Period was fifty-one days. Also as noted above, the range of Payment dates during the Preference Period was between the forty-seventh day and the sixty-fourth day. The court finds that the Payment history during the Preference Period did not differ so substantially from the industry standard as to

take the Payments outside the scope of Section 547(c)(2)(C). The court finds the Debtor's arguments to the contrary unpersuasive.[13]

IV. CONCLUSION

For the reasons set forth below, judgment will be entered for Fabricon and the Debtor will take nothing on the Complaint.

BY THE COURT

DATED: April 21, 2005

_____
Lorraine Murphy Weil
United States Bankruptcy Judge

[13] During Trial, the parties raised certain issues with respect to the relevant industry and the necessity of expert testimony to establish industry practice for Section 547(c)(2)(C) purposes. The court reserved those issues pending briefing. Because both the Debtor and Fabricon relied upon the testimony of Mr. Herbein who was an expert witness and because Fabricon adopted the position of the Debtor with respect to the ADO for a Fabricon invoice to the Debtor for the Pre-Preference Period, Preference Period and the industry standard and adopted the Debtor's statement of the relevant industry (*see* n.11 *supra*), the reserved issues are moot.